

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**COLLEEN MICHELLE SMITH,
as Administratrix of the
ESTATE OF DAVID M. SMITH,**

Plaintiff,

v.

**CIVIL ACTION NO.: 2:20-cv-47
Honorable Thomas S. Kleeh**

**EDWARD W. CLARK, JR., individually
and in his capacity as an officer with the
Lewis County Sheriff's Department,
BO D. HENDERSOT, individually
and in his capacity as an officer with the
Lewis County Sheriff's Department,
JASON CAREY, individually
and in his capacity as an officer with the
Lewis County Sheriff's Department,
LEWIS COUNTY SHERIFF'S DEPARTMENT,
a political subdivision of the State of West Virginia,
LEWIS COUNTY COMMISSION,
a political subdivision of the State of West Virginia,
WESTON LEWIS COUNTY
EMERGENCY AMBULANCE AUTHORITY,
ROCKY SHACKLEFORD, and
NANCY RYDER,**

Defendants.

DEFENDANTS' NOTICE OF TRIAL CONFLICT

Defendants Edward W. Clark, Jr., Bo D. Hendershot, and Jason Carey, by counsel, and pursuant to Local Rule of General Procedure 88.01, hereby notify the Court of a scheduling conflict for the trial of this matter arising under the following set of circumstances:

1. Deputy Hendershot is lead investigator in a murder case, *State v. Blake*, that is set to begin trial in the Circuit Court of Lewis County, West Virginia on August 21, 2023. *See* Continuance for the Term Order, *State v. Blake*, Case No. CC-21-2022-F-45, in the Circuit Court of Lewis Cty., W. Va. (June 22, 2023), attached as "Exhibit 1." In addition, it is anticipated that

Defendants Clark and Carey, although no longer employed by the Lewis County Sheriff's Department, will be called as witnesses in the *State v. Blake* trial.

2. The trial in this matter is also set to begin on August 21, 2023. *See* Order Continuing Pretrial Conference & Trial (Mar. 6, 2023) [ECF No. 190].

3. The undersigned counsel contacted the Lewis County Prosecuting Attorney to determine how likely the *Blake* trial is to occur and whether the parties in that matter might consider a voluntary continuance of their trial, given that the trial in this matter has already been continued twice. The Prosecuting Attorney informed the undersigned counsel that she believes the *Blake* trial is likely to go forward on August 21, 2023, and that the trial in that matter has also previously been continued.

4. Pursuant to this Court's Local Rules, "in the event the scheduling conflict involves a state court, parties must work with the Court to resolve all such scheduling conflicts considering those factors set forth in West Virginia Trial Court Rule 5." L.R. Gen. P. 88.01.

5. Rule 5.02 of the *West Virginia Trial Court Rules* provides that, in resolving scheduling conflicts, the following priorities should ordinarily prevail:

- (a) appellate cases should prevail over trial cases;
- (b) criminal felony trials should prevail over civil trials;
- (c) cases in which the trial date has been first set (by published order or notice) should take precedence over cases which were set later;
- (d) trials should prevail over hearings, and hearings should prevail over conferences; and
- (e) trials and hearings of a judge in travel status should prevail over trials and hearings of a judge sitting in residence.

T.C.R. 5.02.

6. Under the above-mentioned priorities, only two apply. The *Blake* matter involves a felony criminal trial. But this case was set for trial by published order three months before the *Blake* case.

7. In addition to the priorities set forth in Trial Court Rule 5.02, consideration should be given to the following factors when resolving scheduling conflicts:

- (a) age of the cases and number of previous continuances;
- (b) whether sanctions for delay have previously been imposed;
- (c) the complexity of the cases;
- (d) the estimated trial time;
- (e) the number of attorneys and parties involved;
- (f) whether the majority of parties and witnesses are local;
- (g) whether the trial involves a jury;
- (h) the difficulty or ease of rescheduling; and
- (i) the existence of any constitutional or statutory provision granting priority to a particular type of litigation

T.C.R. 5.03.

8. The undersigned counsel is not familiar enough with the *Blake* case to offer insight on how most of the Rule 5.03 additional factors might apply. This case, however, appears to be older than the *Blake* case, which appears to have been filed in 2022, and this case has had two previous continuances. *See* Ex. 1. This case will likely take longer to try than the *Blake* case. *Compare*, Scheduling Order (Mar. 1, 2021) [ECF No. 30] ¶ 17 (estimating fourteen days for trial), *with* Ex. 1 (estimating four days for trial). Both this matter and the *Blake* case involve juries. Finally, in *Blake*, the Defendant has a constitutional right to a speedy trial. *See* U.S. Const. art. VI; W. Va. Const. Art. 3, § 14.

WHEREFORE, pursuant to Local Rule of General Procedure 88.01, Defendants respectfully request that the judges assigned to the above-styled cause of action and the *Blake* case confer, resolve the conflict, and notify counsel of the resolution.

Respectfully submitted this 6th day of July 2023.

/s/ Mark G. Jeffries

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Lewis County Commission

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Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July 2023, I filed the foregoing “*Defendants’
Notice of Trial Conflict*” with the Clerk of the Court using the CM/ECF system, which will send
notification of such filing to the following:

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/s/ Mark G. Jeffries

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